CPLR 4102: Validity of Jury Waiver Clause in Lease Upheld in Action Sounding in Contract

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Appellate Division, Second Department, which states in part that a general preference may be obtained provided "[t]hat the venue of the action was properly laid in the county in which it is pending, within the requirements of the CPLR. . . ." In so holding, the court found that the plaintiffs' choice of venue, Westchester County, was improper under CPLR 503(a) unless the action was jurisdictionally required to be tried there, since Westchester was not the county where one of the parties resided at the time of the commencement of the action. The court further noted that this finding was not impeded by the defendants' failure to oppose the motion or the failure by any of the parties to request a change in venue.

This decision implements the court's inherent power to control its calendar, the cited appellate division rule, and the inconvenient forum policy. "[W]here, as here, one or more of the parties reside in a county in the State the venue preference requirement is singularly applicable and the preference must be sought in the county in which one of the parties resides."

**ARTICLE 41 — TRIAL BY A JURY**

**CPLR 4102: Validity of jury waiver clause in lease upheld in action sounding in contract.**

Prior to the 1965 enactment of section 259-c of the Real Property Law, courts frequently upheld lease provisions in which the right to a jury trial was waived by the contracting parties. Section 259-c limits the efficacy of such clauses by invalidating a jury trial waiver "in any action for personal injury or property damage." Recently, however, in *Lindenwood Realty Co. v. Feldman*, the Appellate Division,

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136 22 NYCRR 674.1(a) (actions for damages for permanent disability or death).
137 72 Misc. 2d at 380, 339 N.Y.S.2d at 400.
138 Id. at 379, 339 N.Y.S.2d at 399.
140 See 4 WK&M ¶ 3403.02.
142 72 Misc. 2d at 380, 339 N.Y.S.2d at 399.
143 Lease waiver provisions have been strictly construed, however, and limited to actions seeking to enforce rights originating under the lease. See 14 CARMODY-WARRY 2d, § 90:262, at 211 (1967); 4 WK&M ¶ 4102.14. See generally 3 J. RASCH, LANDLORD AND TENANT § 1344 (2d ed. 1971).
144 N.Y. REAL PROP. LAW § 259-c (McKinney 1968).
Second Department, strictly construed section 259-c to uphold the validity of a broad jury waiver provision in a lease.

Therein, a landlord sued its tenants to recover for rent and property damage to the leased premises. The appellate term held that section 259-c precluded the landlord from invoking a jury waiver provision in the lease to negate the tenants' demand for a jury trial. The dissent, however, maintained that the words "personal injury or property damage" within the section "traditionally... refer to tort actions arising out of a liability imposed by law for negligence, or even a willful tort, but not out of a contract." This and its view of section 259-c as "a companion section to" section 5-321 of the General Obligations Law, which invalidates an agreement exempting a lessor from liability for "injuries to person or property" caused by his negligence, led the dissent to conclude that the waiver provision in this instance was valid.

When the Second Department reversed the appellate term in a memorandum decision, it adopted the reasoning of the dissent in the lower court.

CPLR 4110: Two-year delay in challenging impartiality of jurors, while awaiting review of favorable verdict, will preclude assertion of such claim.

Since parties to a civil action are entitled to have their case presented before an impartial jury, CPLR 4110 enumerates various grounds for challenging a prospective juror for cause. If, after the verdict, it becomes apparent that circumstances existed which would have been grounds for exclusion of a juror before trial, a court may set the verdict aside. Once his particular interest is demonstrated, whether the juror would decide the case objectively becomes a question of fact for the court provided that a prima facie disqualification does not exist.

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146 72 Misc. 2d at 69, 338 N.Y.S.2d at 244 (Gulotta, J., dissenting).
147 Id. at 70, 338 N.Y.S.2d at 244.
149 But see Swinger Realty Corp. v. A.S. Kizner Imports, Inc., 70 Misc. 2d 742, 335 N.Y.S.2d 108 (App. T. 1st Dep't 1972) (per curiam); 4 WK&M ¶ 4102.14.
150 CPLR 4110 does not exclude common-law grounds for such a challenge. See 7B MCKINNEY'S CPLR 4110, commentary at 158 (1963); 4 WK&M ¶ 4110.07.
152 See 4 WK&M ¶¶ 4110.02, 4110.09. CPLR 4110(b) provides that a relationship "within the sixth degree by consanguinity or affinity to a party" automatically disqualifies a juror.